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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1194

JERRY J. ENOMOTO, et al.,
Petitioners,

vs.

JOHN WESLEY CLUTCHETTE, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINION AND DECISIONS BELOW

The writ of certiorari issued on June 9, 1975, to review the opinion of the United States Court of Appeals for the Ninth Circuit in *Clutchette v. Procunier,* 510 F.2d 613 (9th Cir. 1974). This "Opinion on Rehearing" purported to delineate the impact of *Wolff v. McDonnell,* 418 U.S. 539 (1974) upon the earlier opinion which is reported at 497 F.2d 809 (9th Cir. 1974). As the Opinion on Rehearing republishes substantial portions of the earlier opinion [See 510 F.2d 616] both are before this court on review.

JURISDICTION TO REVIEW

On April 25, 1974, the Ninth Circuit Court of Appeals rendered its first opinion in the appeal of the administrators of the California state prison system from the Memorandum and Order in *Clutchette v. Procunier,* 328 F.Supp. 767 (ND Cal. 1971). The prison administrators moved for a rehearing which they suggested be held en banc and requested modification of the opinion. The panel granted a rehearing limited to the impact of this court's decision in *Wolff v. McDonnell,* 418 U.S. 539 (1974).

Thereafter, on October 21, 1974, that panel issued its Opinioin on Rehearing which modified and reaffirmed its earlier opinion. See *Clutchette v. Procunier,* 510 F.2d at 616. Timely suggestion for a rehearing en banc was made but because that suggestion did not stay issuance of the mandate [Rule 35(c), Federal Rules of Appellate Procedure] petitioners requested, and were granted an extension of time to and including March 20, 1975 within which to petition this court for a writ of certiorari. When the suggestion for a rehearing en banc was denied, we petitioned this court for a writ of certiorari on March 20, 1975. That petition was granted on June 9, 1975.

The jurisdiction of this court rests on Title 28, United States Code Section 1254(1).

QUESTIONS PRESENTED

1. Does the Constitution require counsel in the context of state prison disciplinary proceedings where the alleged misconduct may also violate the state's criminal laws?

2. By its decision, has the Court of Appeals unduly circumscribed the discretion, recognized by this Court as necessarily conferred upon state prison administrators, to experiment with evolving procedures for maintaining prison discipline?

3. Where this Court, the final arbitrator of the Constitution, has enunciated the procedures which comport with the demands of due process as applied to the several states, may lower federal courts properly impose further requirements on the States?

STATUTES INVOLVED

United States Constitution, Amendment V

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless upon a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment XIV, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28, U.S. Code Section 1343

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

Title 42, United States Code Section 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other

person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

California Penal Code Section 2079

"Subject to the orders and the policies established by the department, it shall be the duty of the wardens to supervise the government, discipline and policy of the prisons, and to enforce all orders and regulations."

California Penal Code Section 2080

"A copy of the rules and regulations prescribing the duties and obligations of prisoners shall be furnished to each prisoner in a state prison or other facility under the jurisdiction of the Department of Corrections."

California Penal Code Section 5003

"The [Department of Corrections] has jurisdiction over the following prisons and institutions: (a) The California State Prison at San Quentin."

California Penal Code Section 5054

"The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the [Director of Corrections]."

STATEMENT OF THE CASE

Plaintiffs, several inmates of the California State Prison at San Quentin, filed a complaint for injunctive relief and damages in the United States District Court for the Northern District of California on November 20, 1970 pursuant to Title 42, United States Code Section 1983. They alleged that the administrators of the California prison system had, by the manner in which they conducted prison disciplinary hearings, deprived them of rights secured by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. Specifically, plaintiffs alleged that the procedures employed in prison disciplinary proceedings failed to contain due process safeguards sufficient to comport with the requirements of the Fourteenth Amendment to the United States Constitution. The complaint prayed for a declaratory judgment, preliminary and permanent injunctive relief and, for plaintiff Clutchette, damages.

An order to show cause why a preliminary injunction should not be entered issued the day the complaint was filed (See Single Appendix page 2, Docket Entries 1 and 3) and the hearing on that order to show cause was held two weeks later. On June 21, 1971, the District Court entered its Memorandum and Order declaring that the disciplinary procedures employed by the administrators of the California State Prison at San Quentin violated the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. See, *Clutchette v. Procunier*, 328 F.Supp. 767 (ND Cal. 1971).

The district court went on to enjoin permanently the state prison administrators from conducting further disciplinary hearings under existing procedures. The injunction portion of the district court's order was stayed pending appeal. However, the state prison administrators were ordered to submit a plan for the conduct of prison disciplinary hearings which comported with the standards outlined in the district court's opinion.[1] *Clutchette v. Procunier,* 328 F.Supp. at 784, 785.

An appeal was pursued and on April 25, 1974, a panel of the Court of Appeals, Judge Kilkenny concurring and dissenting, affirmed the decree and orders of the district court as modified only to the extent necessary to comply with the Court of Appeals' opinion. *Clutchette v. Procunier,* 497 F.2d 809, 824 (9th Cir. 1974).

The state prison administrators petitioned for a rehearing which was granted by the panel limited solely to the effect *Wolff v. McDonnell,* 418 U.S. 539 (1974), which had been decided in the interim, had upon this case. On October 21, 1974, the panel issued their final opinion purporting to conform to the views expressed by this court in *Wolff v. McDonnell, supra,* However, they merely modified their earlier opinion only with respect to loss of privileges, confrontation and cross examination of witnesses, and the right to

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[1]The plan submitted to the court by the Director of the California Department of Corrections was objected to by plaintiffs as not in compliance with the district court's order. That plan has been voluntarily put into effect by the prison administrators. See *Clutchette v. Procunier,* 510 F.2d at 616.

counsel or counsel-substitute in disciplinary proceedings other than those involving infractions also punishable by state authorities as crimes. They reaffirmed their prior opinion in all other respects finding the remaining portions either in harmony with *Wolff*, or related to issues untouched by *Wolff*. Judge Kilkenny dissented. *Clutchette v. Procunier*, 510 F.2d 613 (9th Cir. 1974).

John Wesley Clutchette, as an inmate confined in the Adjustment Center of the California State Prison at San Quentin, was required to visit in a particular area of the general prison visiting room. On Novem- 14, 1970, inmate Clutchette was visiting a friend in the prison's visiting room when, without obtaining permission, he moved to a forbidden area of that room. When the officer in charge of the visiting room informed inmate Clutchette that he would have to return to his cell he broke a chair and used the leg to assault an officer. The disciplinary proceeding which formed the basis of this class action followed. As a result of the disciplinary committee's findings, inmate Clutchette suffered several changes in his status: he lost his dessert (Sig. App.[2] page 64); a one hour per day exercise period for 29 days (Sig. App. page 53); his personal possessions, other than legal papers, religious books, and toilet articles were removed from his cell for 29 days (Sig. App. pages 67-69); and the privilege of purchasing items from the inmate canteen was suspended for a period of 60 days (Sig. App. page 59).

[2]"Sig. App." refers to the Single Appendix.

Prior to the imposition of these sanctions inmate Clutchette received written notice of the charges against him (Sig. App. pages 33-35; 104-105). As the hearing commenced inmate Clutchette was advised per *Miranda* of his constitutional right to remain silent and he requested an attorney (Sig. App. pages 46-48). At that time the committee informed him that counsel would be provided if the District Attorney interrogated him or the matter proceeded to the courts (Sig. App. page 49). Although inmate Clutchette signed a waiver of his rights (Sig. App. page 49) he remained silent throughout the disciplinary proceedings. The major charging allegations of the supplemental reports supporting the complaints against inmate Clutchette were read to him (Sig. App. pages 37-38). While he was ultimately found to have committed the charged infractions, the disciplinary committee's major concern was to fashion appropriate sanctions to be imposed for the conduct inmate Clutchette had exhibited so as to prevent a reoccurrence (Sig. App. pages 123-124).

The District Court found from the evidence and exhibits presented at the hearing held December 4, 1970, that inmates accused of serious disciplinary infractions are served with a "notice of complaint"[3] within 24 hours of charges being preferred against them. The District Court however found that prior

[3]This "notice of complaint" is intended to inform the inmate what the charge against him is (Sig. App. 34, 105) and the officer who serves the notice reads the actual report of the alleged disciplinary violation to the inmate (Sig. App. 104-105).

to appearing before the disciplinary committee the inmate was often told only the number of the departmental rule which he had been charged with violating, rather than receiving a description of his particular actions. A hearing officer was required to see an accused inmate within 24 hours of charges being filed against him and could adjudicate offenses of a minor nature. However, all serious offenses were referred to the disciplinary committee. *Clutchette v. Procunier,* 328 F.Supp. at 773-775.

In the District Court's opinion the most troublesome area concerned disciplinary procedures where the inmate was charged with an infraction which could also be prosecuted as a crime. In this situation the disciplinary committee read the inmate his *Miranda* warnings (Sig. App. pages 46-47) but, since the disciplinary committee's function was not to secure incriminating statements for use at subsequent criminal trials, the inmate was advised an attorney would not be made available. The inmate could either exercise or waive his right to remain silent. The disciplinary committee was required to proceed to adjudicate the alleged infraction on the basis of the evidence at its disposal if the inmate remained silent (Sig. App. page 113) and inmates were allowed to present statements of other inmates, correctional officers, or civilian witnesses, in writing, if they wished.

In its initial opinion the Court of Appeals extended the following due process safeguards to all disciplinary hearings conducted in the California State Prison at San Quentin:

1) Prompt notice which informs the inmate of the charges against him and the details of his alleged offense delivered sufficiently in advance of the hearing to enable him to prepare his defense;

2) The right to be heard and to present witnesses limited solely to prevent repetitiousness;

3) The unlimited right to confrontation and cross examination of witnesses including inmates;

4) A "neutral and detached" hearing body; and

5) A decision based on the evidence presented at the hearing.

In addition, when the consequences of disciplinary action are most serious or the conduct could be prosecuted criminally, counsel was required. See *Clutchette v. Procunier,* 497 F.2d 809, 822-823 (9th Cir. 1974).

On rehearing, this opinion was modified so that the procedural safeguards announced did not apply to the temporary suspension of "privileges". The right to confrontation and cross examination was modified so that the prison authorities could limit it but only if they could establish concern for reprisals, unmanageability, disruption, or the safety of prison personnel. Under compulsion of *Wolff, supra,* the previously granted right to counsel or counsel-substitute was modified so as to depend not on the seriousness of the disciplinary sanction threatened, but rather on the ability of the prisoner to present his own case. Holding that this court in *Wolff, supra,* did not reach

the question of the right to counsel when a prisoner is required to appear before a disciplinary committee charged with violating a prison rule which may also be punishable as a crime, the requirement that counsel be provided in that situation was reaffirmed. *Clutchette v. Procunier,* 510 F.2d 613, 616 (9th Cir. 1974).

Our suggestion that this case was of such importance that a rehearing en banc should be granted was denied. We petitioned for certiorari to review the decision of the Court of Appeals which this Court granted on June 9, 1975.

SUMMARY OF ARGUMENT

1. Inmate Clutchette was charged by prison officials with misconduct which could have been criminally prosecuted by other state officials. At his prison disciplinary hearing he was given the opportunity to explain his conduct after receiving *Miranda v. Arizona,* 384 U.S. 436 (1966) type warnings. There is no record of his making any statement at that hearing and no criminal proceedings were ever instituted against him as a result of these prison rule infractions. The courts below reasoned from *Miranda* that all inmates charged with prison rule violations which may also be punished as crimes are entitled to counsel at their prison disciplinary hearings. We contend that counsel is never required in California prison disciplinary proceedings because the Fifth Amendment privilege against self-incrimination, as applied to the

states through the due process clause of the Fourteenth Amendment, is not infringed by the manner in which California prisons conduct their disciplinary hearings.

Miranda did not create a substantive constitutional right to its admonitions. Rather, it declared a judicial rule of procedure governing the admission and exclusion of evidence at trial. *Michigan v. Tucker,* 417 U.S. 439, 444 (1974). Hence, the resolution of the issue whether counsel is required in prison disciplinary proceedings where the alleged misconduct may also be punished criminally should await a case arising from a trial at which an inmate's statement, uttered at his disciplinary hearing, is used against him.

Miranda required counsel to protect the Fifth Amendment right against compulsory self-incrimination. The manner in which prison disciplinary hearings are conducted in California does not infringe the inmate's Fifth Amendment right against compulsory self-incrimination. Although the inmate is faced with a difficult choice, he is not compelled to speak nor is the exercise of his right to silence penalized. The Constitution does not require that he be relieved of this choice. *McGautha v. California,* 402 U.S. 183, 213 (1971).

This Court held in *Wolff v. McDonnell,* 418 U.S. 539, 570 (1974) that counsel was not required in prison disciplinary hearings. There are no circumstances in this case which would warrant the insertion of counsel into those hearings and their alteration into adversary proceedings.

2. In several particulars the initial opinion of the Court of Appeals *Clutchette v. Procunier,* 497 F.2d 809 (9th Cir. 1974) was not modified on rehearing. *Clutchette v. Procunier,* 510 F.2d 613 (9th Cir. 1974). Three areas of the initial opinion, republished by the failure to modify on rehearing, are of particular concern to the administrators of California's prison system: the inmate's ability to call witnesses, the rights to confrontation and cross-examination, and the requirement of a decision based only on evidence presented at the disciplinary hearing. We contend that in each of these areas the Court of Appeals has imposed requirements beyond constitutional minimums and has thereby unduly circumscribed the discretion of California's prison administrators to experiment with new and evolving procedures for maintaining prison discipline.

3. As this Court, not the lower federal courts, is the final arbitrator of the Constitution, once you have delineated the minimum procedures required in prison disciplinary hearings, it is for the states, not the lower federal courts, to go further. *Wolff v. McDonnell,* 418 U.S. at 569; *McGautha v. California,* 402 U.S. 183, 220-221 (1971). Unlike federal courts, state courts are not constrained by the notions of federalism to limit their demands for procedural fairness to the rudimentary. They can, in the exercise of their supervisory powers, fashion extensive and detailed procedures well beyond anything required by the Constitution. When faced with a question of procedural due process in state prison disciplinary hearings, the

lower federal courts must limit their pronouncements to the holdings of this Court.

4. The inmates in this case are not entitled to any retrospective relief. *Wolff v. McDonnell,* 418 U.S. at 555; *Cox v. Cook,* ..... U.S. ....., 43 U.S. Law Week 3513 (74-751 Decided March 24, 1975). The current rules and regulations of the California Department of Corrections concerning inmate discipline go far beyond the minimums compelled by the due process clause of the Constitution. This Court should therefore reverse the opinion of the Court of Appeals and remand the case to the district court with directions to dismiss.

ARGUMENT

I

THERE IS NO RIGHT TO COUNSEL—EITHER RETAINED OR APPOINTED—IN THE CONTEXT OF PRISON DISCIPLINARY PROCEEDINGS

The facts concerning plaintiff John Wesley Clutchette's disciplinary proceeding are for the most part typical of prison discipline cases. On the afternoon of November 14, 1970, Clutchette, an inmate already housed in the San Quentin Adjustment Center, was in the visiting room of the prison when a disturbance erupted. During that disturbance, he assaulted a prison guard with the leg of a broken chair. Thereafter, a disciplinary hearing was held. In accordance with the prison's then applicable procedures [*Clutchette v. Procunier,* 497 F.2d at 815] inmate Clutchette was orally informed by an officer of the charges

against him within 24 hours of the alleged infraction. When he appeared before the disciplinary committee the complaint and a summary of the supplemental reports were read to him and he was afforded the opportunity to explain his conduct after being given the standard *Miranda*[4] warnings. However, upon his requesting the assistance of counsel he was informed that counsel would be provided only in the event that he was subjected to interrogation by a representative of the district attorney's office. Inmate Clutchette apparently exercised his right to remain silent as there is no record of his making any statement at this hearing. Based upon the evidence adduced at that hearing, he was found to have committed the charged infractions of (1) refusing to obey a direct order by an officer, (2) misconduct in the presence of a visitor, (3) conduct that could lead to violence, and (4) assaulting an officer. Although the assault charge was certainly punishable as an independent crime, as is true in almost all such cases, no criminal charge was ever filed against inmate Clutchette on account of this misconduct. As no criminal complaint was filed, a fortiori, there was no use in a criminal proceeding of any statement made by inmate Clutchette.

Both the district court and the Court of Appeals reasoned that under *Miranda v. Arizona, supra,* an inmate charged with a prison rule violation, which may also be punished criminally, must be afforded counsel at the disciplinary hearing. Although the Ninth Circuit recognized that inmates are not inter-

[4] *Miranda v. Arizona,* 384 U.S. 436 (1966).

rogated at such hearings, it nevertheless concluded that because the hearing process "is designed to induce revelation of all facts, including the inmate's version of them" such hearings are inherently inquisitive. *Clutchette v. Procunier,* 497 F.2d 809, 823 (9th Cir. 1974). Accordingly, in order to safeguard the inmate's Fifth Amendment privilege against self-incrimination, that court affirmed the district court's requirement that counsel be provided when a prisoner is charged by prison authorities with a rule violation which may be punishable as a crime by other state authorities.[5] *Clutchette v. Procunier,* 328 F.Supp. 767, 778 (N.D. Cal. 1971), *aff'd* 497 F.2d 809, 823, *aff'd* on rehearing, 510 F.2d 613, 616.

We contend the district court and the Court of Appeals erred in reaching the issue whether counsel

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[5]Alternatively, the Ninth Circuit opined that sufficient protection of the inmate's privilege would be provided if the prison administrators postponed any disciplinary action until after court proceedings or, if the inmate were to be required to speak in his own defense at his disciplinary hearing, he be granted "use-immunity" for his disclosures in any subsequent criminal trial. *Clutchette v. Procunier,* 497 Fed.2d at 823, 834 n.23. Consideration of these options necessarily depends on the validity of the holding that counsel is required at the disciplinary hearings. While delay is the course currently being followed in California prison disciplinary hearings (See, California Department of Corrections, Rules and Regulations, Ch. 4, Art. 5, DP 4507-08, reproduced in the Appendix to the Petition pages xvii-xxi) it seriously delays the imposition of discipline and has led to charges of subterfuge. "Use-immunity" is impractical and unwieldly. The prison administrators have absolutely no authority to grant an inmate any kind of immunity for anything the inmate says at his disciplinary hearing. Since there is no transcription made of disciplinary hearings it is literally impossible to know what questions may be asked and what answers given in order to determine how far any such immunity would extend. The creation of this form of immunity would inevitably "cheapen the Fifth Amendment." *Palmigiano v. Baxter,* 510 Fed.2d 536 (1st Cir. 1974), cert. granted.

is required in prison disciplinary hearings to protect inmates' Fifth Amendment rights. Inmate Clutchette made no statement. He availed himself of his Fifth Amendment rights. There is therefore no case nor controversy between the parties in this case. The resolution of this issue whether there must be counsel at disciplinary hearings to protect Fifth Amendment rights at trial should await the case where an inmate's statement, taken during a prison disciplinary hearing, is admitted in evidence at a subsequent criminal trial. It is our position that counsel is never required in California prison disciplinary proceedings for Fifth Amendment reasons because the Fifth Amendment privilege against self-incrimination is not infringed by the manner in which those hearings are conducted.

At the outset, we emphasize that the issue here does not concern the admission into evidence at trial of any statement, incriminating or otherwise, made by a prison inmate while at a disciplinary hearing. This case does not arise from a criminal conviction in which an arguably involuntary statement was admitted into evidence over the objection of the defendant.[6] We are here concerned with whether, as a constitutionally compelled procedure, state prison administrators must afford inmates the assistance of counsel at prison disciplinary hearings whenever the mere possibility of subsequent criminal prosecution exists. The courts

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[6]We submit, as with any question of the possible use at trial of arguably compelled disclosures, these issues are properly resolved when they arise from a trial setting rather than, as here, trying to decide them on the basis of hypothesis. *United States v. Ben Blue*, 384 U.S. 251, 255 (1966).

below reasoned that *Miranda* created substantive rights to its respective admonitions thereby requiring that an inmate, whose misconduct may also be criminally punishable, must be afforded an attorney upon request at his prison disciplinary hearing. We contend the *Miranda* warnings are simply judicially declared rules of procedure governing the admission and exclusion of evidence at trial. We submit that the opinions of the courts below mandating the implementation of these warnings as a basic constitutional imperative are based upon a fundamental misreading of *Miranda*.

The central concern of *Miranda* was and is the protection of an accused's Fifth Amendment right to remain silent. The suspects in the *Miranda* group of cases had been arrested, held in custody at a police station, and subjected to protracted police interrogation using inherently coercive techniques. This Court held that absent appropriate safeguards to protect the accused's right to remain silent, any resulting confession must be deemed the product of that coercion and therefore to have been compelled within the meaning of the Fifth Amendment. *See Miranda v. Arizona*, 384 U.S. *supra* at 457-58.[7] Although the *Miranda*

[7]In support of this conclusion, the Court elaborately recounted examples of past brutality, torture, and psychologically coercive interrogation techniques, utilized by the police to intimidate a suspect and subject him to the will of his examiner. *Id.* at 445-57. These methods of custodial interrogation, purposefully designed to overcome any reluctance to confess, necessitated the prophylactic warnings of the suspect's privilege against compulsory self-incrimination. Further, in order to insure the trustworthiness of any resulting confession, and that the accused's rights were in fact being honored, this Court required, as a part of those admonitions, that the suspect be afforded the presence of counsel. *Id.* at 470-71.

warnings have by now become a litany whose rote recitation is seemingly imbedded in the Constitution, these suggested safeguards were never envisioned as being of constitutional dimension. They were considered necessary to preserve the right to remain silent in the face of incommunicado police interrogation. Their application was not intended to create a constitutional straitjacket around state officials.

> "It is impossible for us to foresee the potential alternatives for protecting the privilege which may be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted." 384 U.S. *supra* at 467.

Thus, "these procedurai safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." *Michigan v. Tucker,* 417 U.S. 439, 444 (1974).

Where the *Miranda* warnings are required but not given the inquiry whether the Fifth Amendment protection against compulsory self-incrimination has been infringed upon turns on "a comparison of the facts [of the case] . . . with the historical circumstances underlying the privilege against self-incrimi-

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But, there are no similar "psychologically coercive interrogation techniques" designed to elicit incriminating statements employed at California prison disciplinary hearings. To the contrary inmates are informed that their silence will not result in adverse inference or consequence.

nation. *Michigan v. Tucker*, 417 U.S. at 444-445. By analogy whether *Miranda* warnings and the presence of counsel are required in prison disciplinary proceedings ultimately turns on whether the procedures utilized at those proceedings directly infringe the Fifth Amendment as applied to the States through the due process clause of the Fourteenth Amendment.[8] A comparison of the procedures utilized in California prison disciplinary proceedings with the historical circumstances underlying the privilege against compulsory self-incrimination compels the holding that the inmate's Fifth Amendment rights are not directly infringed. Hence, due process requires neither the *Miranda* warnings nor counsel.

The history of the evil uses of the ecclesiastical inquisition and Star Chamber proceedings, which led to the adoption of the Fifth Amendment privilege against self-incrimination, have been recounted in the opinions of this Court. *See, e.g., Michigan v. Tucker, supra; Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964); *Ullman v. United States*, 350 U.S. 442 (1956). "[T]hose investigations, which placed a premium on compelling subjects to admit guilt from their own lips. . . ." [*Michigan v. Tucker, supra*, at 440] fos-

[8]Since disciplinary hearings are not part of the criminal process [*Wolff v. McDonnell*, 418 U.S. at 556], there is no Sixth Amendment right to counsel. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972). If there is any right to counsel at prison disciplinary proceedings, it must spring from the due process clause, and

> "[d]ue process of law, as we comprehend it, does not necessarily include or exclude representation by counsel. The substance of due process may be denied although the accused is represented by a coterie of counsel, yet he may have it although unaccompanied by counsel." *Amrine v. Tines*, 131 F.2d 827, 833 (10 Cir. 1942).

tered the desire on the part of the framers of the Constitution to protect citizens against any such compelled disclosures. In *Miranda,* this concern was extended to police interrogations, because of their inherently coercive atmosphere and severe pressures to confess guilt. Prison disciplinary proceedings, however, present a fundamentally different situation. They are informal hearings, conducted to insure that discipline is not imposed arbitrarily, *see Wolff v. McDonnell,* 418 U.S. 539 (1974), and in such a way that the inmate perceives the hearing process as being essentially fair. The California prisoner is informed of the charges against him and given an opportunity to respond. But he is not questioned. Certainly none of the interrogation techniques which led this Court to develop the *Miranda* safeguards are present in these hearings. There are no psychological ploys used to overcome a resistance to confess. Indeed, it has never been charged, even by these plaintiffs, that inmates are in any way threatened with reprisals or adverse inference if they refused to talk. In short, the hearings under consideration in this case simply do not represent the kind of evils which gave rise to the need for *Miranda* warnings to protect the Fifth Amendment privilege.

Although prison disciplinary hearings are not, from an historical perspective, proceedings which would have necessitated the protection of the Fifth Amendment, its protection is applicable to those proceedings whenever there is an exposure to criminal responsibility. We insist, however, that prison disciplinary proceedings as conducted in California do not in any

way infringe the rights protected by the Fifth Amendment. The privilege against compulsory self-incrimination applies beyond its literal reference to criminal cases "to criminal and civil proceedings alike whenever the answer might tend to subject to criminal responsibility him who gives it." *Lefkowitz v. Turley,* 414 U.S. 70, 77 (1973). Thus, the privilege has been held to apply in situations where an individual may be criminally punished for what he has been compelled to say, *Malloy v. Hogan,* 378 U.S. 1 (1964), or in the alternative where the exercise of the right to remain silent is itself penalized. *Griffin v. California,* 380 U.S. 609 (1965). But, unlike cases such as *Lefkowitz,*[9] which penalized the refusal to speak, the mere silence of a prison inmate does not result directly in the imposition of any penalty. *Cf. United States v. Solomon,* 509 F.2d 863, 872 (2d Cir. 1975). An inmate is not punished on account of his silence and he remains completely free at all times to exercise that privilege. He is informed that he has a right to remain silent and that if he chooses to speak his words may be used against him.[10] Thus, he need not speak upon fear of punishment solely because of his silence. Before he can be disciplined there must be an affirmative showing, by a preponderance of the evidence, that he has committed the charged infraction. This showing is made

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[9]See also *Gardner v. Broderick,* 392 U.S. 273 (1968), *Sanitation Men v. Sanitation Comm'r,* 392 U.S. 280 (1968), *Garrity v. New Jersey,* 385 U.S. 493 (1967); *Spevak v. Klein,* 385 U.S. 511 (1967); *Murphy v. Waterfront Comm'n,* 378 U.S. 52 (1964); *Griffin v. California,* 380 U.S. 609 (1965).

[10]His words may of course exculpate him or mitigate the infraction.

before the inmate need decide whether to remain silent or speak in his own defense. *Cf. Brooks v. Tennessee,* 406 U.S. 605 (1972). And, there is no legal sanction forcing the inmate to forego his right of silence. The inmate at a prison disciplinary hearing is simply not exposed to "the cruel trilemma of self-accusation, perjury or contempt." *Murphy v. Waterfront Comm'n,* 378 U.S. at 55.

Although the inmate is not compelled to speak upon pain of being punished for choosing to remain silent, we recognize that he is faced with a difficult choice. He is, in the vernacular, caught between a rock and a hard place. Should he decide to remain silent, he loses one opportunity to explain his behavior. On the other hand, if he admits his misconduct by way of justification or mitigation, he risks possible incrimination. To be sure, the choice is not a pleasant one. But the events necessitating that the inmate choose do not render the decision coerced nor unlawfully infringe upon the right to remain silent. There are numerous instances in which the desire to speak in one's own defense must be weighed against the consequences of making this election. This is the essential hard choice facing every defendant at a criminal trial.

> "[T]he legal system is replete with situations requiring 'the making of difficult judgments' as to which course to follow. . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *McGautha v. California,* 402 U.S. 183, 213 (1971); *see United States v.*

Kordel, 397 U.S. 1 (1970); *De Vita v. Sills,* 422 F.2d 1172 (3d Cir. 1970).

In *Crampton v. Ohio,* the companion case to *McGautha,* the defendant, charged with murder and facing the death penalty, attacked the Ohio unitary trial system, arguing that under this system he could not address the jury on the issue of mitigating punishment without at the same time foregoing his right to remain silent on the issue of guilt. *Id.* at 220-221. This Court did not dispute that the free exercise of his Fifth Amendment right of silence was burdened, but it did not agree that this burden was impermissible. Since there were legitimate reasons for the unitary trial procedure, this Court held that Crampton's desire to speak to his sentencer on mitigation did not unconstitutionally compel his incrimination as to guilt and as a result did not infringe his right to remain silent. *Id.* at 216. Similarly, in the case of an inmate at a prison disciplinary hearing, the pressures which lead him to speak arise from "the force of historical fact beyond both his and the State's control and the strength of the State's case built on those facts. Response to that kind of pressure by offering evidence or testimony is not compelled self-incrimination transgressing the Fifth and Fourteenth Amendments." *Id.* at 216; *Williams v. Florida,* 399 U.S. 78, 85 (1970).[11] Since the challenged procedure serves purposes other than "needlessly" penalizing protected rights, the Constitution does not, as a matter of due process, for-

[11]See *Shimabuku v. Britton,* 503 F.2d 38 (10th Cir. 1974); *Flint v. Mullen,* 499 F.2d 100 (1st Cir. 1974).

bid compelling the choice even though it has the effect of discouraging the exercise of the protected rights. *Chaffin v. Stynchcombe,* 412 U.S. 17, 30-32 (1973); *Brady v. United States,* 397 U.S. 742, 746 (1970); *see United States v. Jackson,* 390 U.S. 570, 582 (1970); *Brown v. United States,* 356 U.S. 148 (1958). The purpose of the challenged procedure, the need to impose discipline swiftly, both as a deterrent and as part of the rehabilitative process, has been already recognized.

> "Indeed, it is pressed upon us that the proceedings to ascertain and sanction misconduct themselves play a major role in furthering the institutional goal of modifying the behavior and value systems of prison inmates sufficiently to permit them to live within the law when they are released. Inevitably there is a great range of personality and character among those who have transgressed the criminal law. Some are more amenable to suggestion and persuasion than others. Some may be incorrigible and would merely disrupt and exploit the disciplinary process for their own ends. With some, rehabilitation may be best achieved by simulating procedures of a free society to the maximum possible extent; but with others, it may be essential that discipline be swift and sure. In any event, it is argued, there would be great unwisdom in encasing the disciplinary procedures in an inflexible constitutional straitjacket that would necessarily call for adversary proceedings typical of the criminal trial, very likely raise the level of confrontation between staff and inmate and make more difficult the utilization of the disciplinary process as a tool to advance the rehabilitative goals of the institution.

> This consideration, along with the necessity to maintain an acceptable level of personal security in the institution, must be taken into account. . . ." *Wolff v. McDonnell,* 418 U.S. at 562-563.

"The constitutionally compelled minimum requirements of procedural due process appropriate in prison disciplinary proceedings [*Wolff v. McDonnell,* 418 U.S. at 558] provide the inmate with an opportunity to present his defense without the necessity of counsel. This Court has emphasized that "prison disciplinary hearings are not a part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Wolff v. McDonnell,* 418 U.S. 539, 556 (1974); *cf. Morrissey v. Brewer,* 408 U.S. 471, 488 (1972). Nor, is it controlling that the charged prison rule violation may also violate state law. In *Wolff,* the prison inmates had been charged, among other things, with fighting, drunkenness, and threatening an officer's life, charges which certainly could have punished criminally.[12] Although this Court did not specifically refer to this possibility, it implicitly rejected the basis for the Court of Appeals decision, namely that "counsel must be provided where a prison rule violation may be punishable by state law." *Wolff v. McDonnell,* 418 U.S. at 573, n. 20. Rather, in reaching what this Court considered to be a reasonable accommodation between the interests of the inmate and the needs of the institution stated:

> "The insertion of counsel into the disciplinary process would inevitably give the proceedings a

[12]See Nebraska Revised Statutes sections 28-411; 28-743; 28-821.

> more adversary cast and tend to reduce their utility as a means to further correctional goals. There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held. At this stage of the development of these procedures we are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings." *Id.* at 570; *see Goss v. Lopez,* 419 U.S. 565, 584 (1975).

Certainly the considerations which led the Court to this conclusion have not changed. The practical problems which would inevitably result from the introduction of counsel into this setting, *see Gagnon v. Scarpelli,* 411 U.S. 778, 787-788 (1973), remain the same. The disciplinary hearing process which thus far has been an informal proceeding would of necessity be transformed into a form of adversary hearing.

> "Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty. The appearance of counsel for the [inmate] is likely to lead the government to provide one—or at least to cause the government's representative to act like one. The result may be to turn what might have been a short conference leading to an amicable result into a protracted controversy."[13]

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[13]Friendly, *"Some Kind of Hearing,"* 123 U.Pa.L.Rev. 1267, 1288 (1975).

In the prison setting the potential for volatile effects resulting from another adversarial proceeding is incalculable. "[P]risons, by their very nature packed with intensive emotional problems, would be kept at a perpetual boling point. . . ." *Braxton v. Carlson,* 483 F.2d 933, 941 (3d Cir. 1973).

A primary responsibility of State prison officials is to avoid such disruptions[14] and prevent escapes, assaults, and similar misconduct. The summary disposition of infractions is essential to the identification and isolation of potential problems. Major problems can be prevented by prompt and certain response to infractions. The ability to act promptly is essential, and the summary disciplinary hearing serves that purpose well. To delay[15] those proceedings or subject them to adversary concepts which formalize and slow the response, seriously impairs the ability of prison officials to carry out their responsibility to maintain security.

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[14]"In considering plaintiff's claim that the disciplinary procedure at Green Haven denies him due process, we recognize that prison officials are not dealing with a group of genteel citizens noted for their law-abiding characteristics. On the contrary most present a constant threat of unruliness and have already engaged in serious anti-social activities leading to their imprisonment." *Carothers v. Follette,* 314 F.Supp. 1014, 1027 (S.D.N.Y. 1970).

[15]Delaying disciplinary hearings until the prosecuting authorities decide whether to proceed against the inmate in the courts is the only viable choice afforded petitioners by the decisions below. Reluctantly they have adopted it throughout the California State prison system. See Rules and Regulations of the Director, DP-4508, reproduced in the Appendix to the Petition, pages xx-xxi. This procedure has been objected to by the plaintiff inmates in this case and has caused a serious problem in the maintenance of prison discipline. It is unnecessary since over 95% of all prison rule violations which may also be criminal acts are never prosecuted.

Discipline is directly related to the concept of security. It is established by the inmate's knowledge that rules infractions will be dealt with promptly. It is diminished by interposing procedural obstacles which prevent its operation. It seems clear that if the right to counsel, who presumably will be bound to exercise his familiar techniques, has any effect on prison discipline, such effect would be neutral at best and adverse in all but the most stable of institutional environments.

> "We believe, therefore, that the transformation of this informal hearing into a formal adversary proceeding with the full panoply of counsel, cross-examination, witnesses and written record could be self-defeating. We are apprehensive of the volatile effect such adversarial proceedings could have on internal prison control and stability. We fear that prisons, by their very nature packed with intensive emotional problems, would be kept at a perpetual boiling point by formal adversarial proceedings often involving varying shades of minor infractions." *Braxton v. Carlson,* 483 F.2d *supra* at 941.

The rehabilitary function of the disciplinary hearing has been judically recognized. A prison disciplinary committee

> ". . . is not merely a guilt adjudicating disciplinary body. It is also part of the rehabilitation and correctional system for determining the institutional program and service to which the inmate should be referred." *Id.* at 939.

In summary, the prison disciplinary hearing is a complex proceeding with separate but interrelated func-

tions. To allow prisoners the assistance of counsel would destroy the ability to accomplish several of those functions.[16]

At current disciplinary hearings there is neither prosecution nor defense counsel. The proceeding is not adversarial. Imposition of counsel rights would probably require counsel for both sides and a lawyer to act as a hearing officer. Equal protection would demand that indigents have appointed counsel. The nature of the entire process would change from a summary hearing to a judicial proceeding. Rather than shaping the hearing to match the function, it would be allowing the hearing to shape the function.

II

THE COURT OF APPEALS' DECISION UNDULY CIRCUMSCRIBES CALIFORNIA PRISON ADMINISTRATOR'S DISCRETION

A) Ability to call witnesses

In its initial opinion the Court of Appeals conferred on the accused inmate virtually unlimited authority to call any witness he wished in his defense.

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[16]Because the nature of the disciplinary hearing is essentially non-judicial, we question what use counsel would serve. ". . . . [F]ormal rules of evidence would be entirely inappropriate at a disciplinary proceeding. To dispose sensitively and carefully of each prisoner's unique case with due regard for the effect of each decision on the total fabric of the prison community, prison authorities must have wide access to relevant information. Since, in addition, there is no likelihood that substantial rights would be sacrificed if a prisoner failed, for example, to raise a proper objection or to take a timely appeal, the need for legal skill is less acute here than in *Mempa* . . . ." *Sostre v. McGinnis*, 442 Fed.2d 178, 196 (2nd Cir. 1971), cert. denied, 404 U.S. 1049; 405 U.S. 978.

Clutchette v. Procunier, 497 F.2d at 818. This "Right to Present Witnesses" was subject only to the authority of the disciplinary committee "to limit the number of witnesses called to prevent repetitiousness. . . ." *Clutchette v. Procunier*, 497 F.2d at 818. Subsequently, this Court recognized that:

> "Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence. Although we do not prescribe it, it would be useful for the Committee to state its reasons for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazard presented in individual cases. Any less flexible rule appears untenable as a constitutional matter, at least on the record made in this case." *Wolff v. McDonnell*, 418 U.S. at 566.

Yet the "Right to Present Witnesses" portion of the Court of Appeals initial opinion was not modified on rehearing. Hence, all prison officials in the territorial jurisdiction of the Ninth Circuit may not refuse to call a witness requested by an inmate for any reason other than "to prevent repetitiousness." Though California prison administrators do not object to giving reasons for not calling witnesses requested by an inmate,[17] they do object to the Court of Appeals' inflexible rule which they submit is "untenable as a constitutional matter". *Wolff v. McDonnell*, 418 U.S.

[17]See Rules and Regulations of the Director, DP-4507, reproduced in the Appendix to the Petition, page xviii.

at 566. We ask that we be given the discretion to control the calling of witnesses.

B) Confrontation and Cross-Examination

In its initial opinion, the Court of Appeals also held that inmates had the right to confront and cross-examine their accusers. A right which that court held transcended almost every other consideration. *Clutchette v. Procunier,* 497 F.2d at 818-820. Recognizing that the right to confrontation and cross-examination presented the greatest hazard to institutional interests, and that an adequate basis for decision in prison disciplinary cases can be reached without such rights, this Court has concluded that the Constitution does not require their imposition. *Wolff v. McDonnell,* 418 U.S. at 567-568. Whether, in any given case, confrontation and cross-examination would be helpful in prison disciplinary proceedings, is committed by this Court to the "sound discretion of the officials of state prisons." *Wolff v. McDonnell,* 418 U.S. at 569. On rehearing the Court of Appeals purported to curtail its extension of these rights to conform to *Wolff*. However, an examination of that "modification" reveals that it is in effect a republication of unlimited rights with respect to infractions of prison rules which can also be punished as crimes.[18]

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[18] "Whenever a prisoner requests and is denied the privilege of confrontation and cross-examination in a disciplinary proceeding in which a serious sanction can be imposed *(excluding a proceeding for an infraction that is also a crime)*, the prison authorities must enter in the record of the proceeding and make available to the prisoner an explanation for the denial." *Clutchette v. Procunier,* 510 F.2d at 616. (Emphasis added)

In all other disciplinary hearings the court's purported modification still imposes on prison administrators an inflexible rule which is "untenable as a constitutional matter." *Wolff v. McDonnell,* 418 U.S. at 566.

With respect to serious infractions (other than infractions which can also be punished as crimes) the Court of Appeals, under the aegis of providing a method by which the exercise of discretion by prison administrators could be reviewed, in fact limited that discretion by permitting only four grounds for its exercise *i.e.* risk of refusal, unmanageability, disruption and the safety of prison personnel. *Clutchette v. Procunier,* 510 F.2d at 616. We have no objections to recording the reasons for refusal but ask that this Court restore such interests as avoidance of resentment, speed of action, maintenance of control, assisting the rehabilitative process and indeed all the interest factors mentioned by this Court in *Wolff v. McDonnell,* 418 U.S. at 568-569. We ask the Court to strike this portion of the Court of Appeals' opinion.

> "There may be a class of cases where the facts are closely disputed, and the character of the parties minimizes the dangers involved. *However, any constitutional rule tailored to meet these situations would undoubtedly produce great litigation and attendant costs in a much wider range of cases.* Further, in the last analysis, even within the narrow range of cases where interest balancing may well dictate cross-examination, courts will be faced with the assessment of prison officials as to the dangers involved, and there

> would be a limited basis for upsetting such judgments. The better course at this time, in a period where prison practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons." *Wolff v. McDonnell*, 418 U.S. at 569. (Emphasis added)

In its initial opinion the Court of Appeals relying on cases discussing due process safeguards appropriate in a free society or in parole and probation settings, extended, virtually without limit, the rights to confrontation and cross-examination. The Court of Appeals held those rights transcendent over all other countervailing governmental or private interests including even those of other inmates be they victims or witnesses.[19] On rehearing the Court of Appeals excepted from the modification of its previously extended rights to confrontation and cross-examination disciplinary hearings involving infractions which are also punishable as crimes. See footnote 18 supra page 33.

By excepting infractions which may possibly be punishable as crimes from its subsequent modified opinion, this may well mean that the first opinion is in full force and effect as to these hearings. This means full trial-type rights of confrontation and cross-examination. But this Court ruled otherwise in *Wolff*

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[19]This Court in *Wolff* expressed concern for the safety of the victim, or witness inmate. Yet, in the opinion of the Court of Appeals, these rights of the accused inmate are so paramount that a victim or witness inmate may have to subject himself to segregated custody. *Clutchette v. Procunier*, 497 F.2d at 819.

noting it is inappropriate to transplant procedural due process concepts from the free society to the prison society and concluded that confrontation and cross-examination are not fully applicable to prison disciplinary hearings.

> "We think that the Constitution should not be read to impose the procedure at the present time and that adequate basis for decision in prison disciplinary cases can be arrived at without cross-examination.
>
> Perhaps as the problems of penal institutions change and correctional goals are reshaped, the balance of interests involved will require otherwise. But in the current environment, where prison disruption remains a serious concern to administrators, we cannot ignore the desire and effort of many States, including Nebraska and the Federal Government, to avoid situations that may trigger deep emotions and that may scuttle the disciplinary process as a rehabilitation vehicle." *Wolff v. McDonnell,* 418 U.S. at 568.

The California prison administrators ask that the discretion so fleetingly enjoyed by them after *Wolff* and before second *Clutchette* be restored. We ask that the parenthetical exclusion of infractions also possibly punishable as crimes from the procedures afforded by *Wolff* be disapproved.

C) A decision based on the evidence presented

The Court of Appeals' opinion precludes the disciplinary committee from considering information which was not presented at a hearing attended by the inmate. This holding is premised on the grounds that

any other procedure would violate the inmate's right to confrontation and cross-examination. *Clutchette v. Procunier*, 497 F.2d at 820. Although the Court of Appeals purported to modify its opinion in accordance with *Wolff* so that confrontation and cross-examination are not required in every disciplinary hearing, [see *Clutchette v. Procunier*, 510 F.2d at 615-616] that court did not modify its requirement that the disciplinary committee must make its fact-finding determinations based solely on evidence presented at a hearing attended by the accused inmate. Petitioners respectfully submit this requirement goes beyond constitutionally mandated minimums of procedural due process for prison disciplinary proceedings and unduly restricts their discretion.

The Nebraska regulations challenged in *Wolff* provided that the disciplinary committee could conduct additional investigation if it desired after the hearing was held and before punishment was imposed. *Wolff v. McDonnell*, 418 U.S. at 553. The twin safeguards of "advance written notice" and "a written statement of the factfinders as to the evidence relied upon" [*Wolff v. Donnell*, 418 U.S. at 563-564] provide the accused inmate an opportunity to reply to any evidence against him upon which the disciplinary committee may rely in reaching its decision. But, the committee should be free to receive and consider information not made available to the accused inmate. *Wolff v. McDonnell*, 418 U.S. at 565. Petitioners respectfully submit that procedural due process requires only that the accused inmate be given an opportunity to respond to any evidence adverse to him which may be consid-

ered by the disciplinary committee before reaching its decision. He can be afforded this opportunity either by appearing in person before the committee or by submitting a documentary response.

The requirement that the disciplinary committee file a written statement of the evidence relied upon, including the reasons for the discipline imposed, *Wolff v. McDonnell,* 418 U.S. at 564,[20] renders unnecessary the imposition of the additional procedure that the decision of the disciplinary committee be based solely on evidence presented at a hearing.

III

THE COURT OF APPEALS HAS IMPOSED PROCEDURES ON CALIFORNIA PRISON ADMINISTRATORS BEYOND THE MINIMUM STANDARDS REQUIRED BY THE FEDERAL CONSTITUTION

The relationship of the State and the Federal judiciary can be abrasive and sometimes is appallingly so. It is, of course, the clear constitutional duty of the Federal judiciary to ensure that the individual states respect and honor those rights guaranteed to its citizens by the United States and this Court is, excepting only the power of the People to amend, the final arbiter of what the Constitution commands. We have no argument with the propositions that the Federal Constitution has entered every cranny of the state

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[20]This procedure was also ordered by the Court of Appeals [*Clutchette v. Procunier,* 497 F.2d at 820], and is incorporated in the petitioners' current rules for inmate discipline. See Director's Rule DP-4507, Appendix to the Petition, p. xx.

prisons and that it is the duty of all Federal Courts to see that it is honored. The Civil Rights Act (Title 42 USC 1983) provides a vehicle for entry.

The question to which we address ourselves is—who delineates the perimeter of the Federal Constitution in the setting of state prisons. Where this court has spoken, there is no room for argument, it delineates the constitutional minima, the pilings on which the sister states may build their separate houses. Any divergence by the states from these basics must of course be corrected and we doubt neither the power nor the ability of the federal district courts, as supervised by the Courts of Appeal and this Court, to so act. The federal district courts should be guided however by this Court's expression of confidence that they will remain "mindful of their delicate role in the maintenance of proper federal-state relations. . . ." *Townsend v. Sain*, 372 U.S. 293, 318 (1963).

With respect, we insist that much of the problem facing both prison administrators and this Court has been due to a series of lower federal court decisions, each proclaimed by its adherents to be "seminal", which purport to add new federal constitutional rights or recognize newly emerging rights. We do not say that the lower federal courts should not indulge in this process. On the contrary, it has long been the pride of the American law that it had many laboratories each formulating its solutions to particular problems within the constitutional framework. But we do submit that when the lower federal courts do other than apply the letter of the Constitution, as

propounded by this Court, they should confine themselves to federal territorial institutions. In short, in the context of state penal institutions, if there is a lacuna, it is for the state courts or prison administrators to fill it. If there is an advance, it is for the state courts or administrators to make it. Subject always to this Court's power to reach out and correct aberrations beyond the constitutional pale or declare new due process safeguards.

> "The better course at this time, in a period where prisons practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons." *Wolff v. McDonnell,* 418 U.S. at 569.

This Court has expressed a reluctance to enshrine more than the essentials of fair procedure as constitutional imperatives, even though they do not necessarily nor even probably comport with the views of the members of this Court as to socially desirable criminal procedures. *McGautha v. California,* 402 U.S. 183, 220-221 (1971). The Constitution, which marks the limit of the authority of federal courts in cases challenging state procedures, does not guarantee procedures that are the "best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology. . . ." *Id.* Since *McGautha,* one of Mr. Justice Harlan's last opinions, this Court has accepted his notions of due process and federalism—that the Constitution should be construed as setting only threshold standards of rudimentary fairness, with further embellishments of procedure left to the states and the federal courts as independent

jurisdictions—in several cases. See, e.g., *Ross v. Moffitt,* 417 U.S. 600, 609-612, 618-619 (1974); *Cupp v. Naughten,* 414 U.S. 141, 144-146, 149-150 (1973); *Chaffin v. Stynchcombe,* 412 U.S. 17, 21-23, 29-35 (1973); see also Friendly, *Mr. Justice Harlan, As Seen by a Friend and Judge of an Inferior Court,* 85 Harv. L. Rev. 382, 388 (1973).

The states have a recognized peculiar expertise and special interest in resolving prison problems. *Preiser v. Rodriquez,* 411 U.S. 475 (1973). California's prison administrators and courts have shown a concern for, and a sensitivity to, the plight of parolees, *In re Strum,* 11 Cal.3d 258, 113 Cal.Rptr. 361 (1974); probationers, *People v. Coleman,* 13 Cal.3d 867, 120 Cal. Rptr. 384 (1975), and inmates, *In re Prewitt,* 8 Cal. 3d 470, 105 Cal.Rptr. 318 (1972). Unlike federal courts, state courts are not constrained by the notions of federalism to limit their demands for procedural fairness to the rudimentary. They can and do in the exercise of their supervisory powers fashion extensive and detailed procedures. Compare, *People v. Coleman,* 13 Cal.3d at 888, 120 Cal.Rptr. at 401. Hence, litigating these questions in the state courts serves not only the State's interest in having internal prison matters reviewed initially in its own courts, but also the interests of the inmates since state courts are free to fashion relief more extensive than federal courts properly can.

This view of the proper federal-state relationship is no stranger in the Courts of Appeal. In the instant case, Kilkenny, J. dissenting said:

> "If the court finds that the procedural due process safeguards required by *Wolff* are recognized in the current rules and regulations, the case should be dismissed. Otherwise, the court should direct appellants to amend the rules and regulations to comply with such safeguards." *Clutchette v. Procunier,* 510 Fed.2d at 616.

And, in *Gomes v. Travisono,* 510 Fed.2d 537, 541 n.4 (1st Cir. 1974), a unanimous court held their duty to be discharged when they had conformed their previous decision to *Wolff*. We submit that the tide of federal litigation will ebb when inmates realize that the federal watchword is circumspection and not circumnavigation.

If a lower federal court feels itself compelled to be "seminal", let it cast its seed on federal ground; let it build its landmark on federal property; let it engrave its initials on the stone of federal prisons.

CONCLUSION

The only relief available to respondents in federal court would be an injunction enjoining the prospective enforcement of invalid prison regulations. *Wolff v. Donnell,* 418 U.S. at 555. They are not entitled to retroactive application directing expungement from their prison records of previous disciplinary proceedings conducted without affording these minimum procedural due process safeguards or money damages. *Cox v. Cook,* ..... U.S. ....., 43 U.S. Law Week 3513 (74-751 Decided March 24, 1975); *Wolff v. McDonnell,*

418 U.S. at 573-574. The current rules and regulations of the California Director of Corrections setting forth the procedural safeguards to be afforded in prison disciplinary hearings are reproduced in the Appendix to the Petition, pp. ix through xxviii. We submit they comport with, and exceed, any minimum procedural due process safeguards required by the Constitution and therefore respectfully request this Court reverse the decision of the Court of Appeals for the Ninth Circuit and remand the case with directions to dismiss.

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